(1)
Supreme Court, U.S.
FILED
961876 MAY 19, 1998
OFFICE OF THE CLERK

IN THE UNITED STATES SUPREME COURT
October term 1997

Lars W. Ehrlander,
Petitioner,

v.

The State of Alaska, D.O.T.; Mr. John Athens,
in his official and personal capacity
Respondents.

On Petition For Writ of Certiorari
to the Alaska Supreme Court

PETITION FOR WRIT OF CERTIORARI

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104 pp

1. Whether futile attempts to raise issues in a sister case trigger *res judicata* in an independent action, when the issues had been formally reserved for future litigation and the claims involves bifurcated issues, post trial issues, and fraud;

2. Whether a state supreme court, sua sponte, may take on the role of fact finder and jury;

3. Whether a state's providing due process and just compensation and adhering to state and federal condemnation laws is discretionary;

4. Whether a federal civil rights claim can be dismissed on time bar and immunity before the damage is known, when there has been ongoing litigation and continuous fraud and when the dismissal is based on erroneous interpretation of federal law;

5. Whether the State of Alaska or its officers may stipulate to bifurcate valuable federal property rights to a second trial, benefit from part performance, and breach the agreement when it was too late to appeal the first trial, resulting in the state's taking vested property rights absent due process or compensation;

6. Whether our federal constitutionally protected rights were violated when our family was singled out to pay a disproportionate share of this public project.

LIST OF PARTIES

Mr. Lars W. Ehrlander, pro se petitioner.

v.

The State of Alaska, Department of Transportation, and
Mr. John Athens, State Counsel, in personal and official capacity.

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08-03-95 Judge Savell denies discovery, pending sum. judgment

12-13-95 Judge Savell Memorandum Decision dismissing all claims

03-04-96 Judge Savell Final Judgment

04-30-96 Alaska Supreme Court denies raising issues in sister case

03-12-97 Alaska Supreme Court upholds the lower court

04-07-97 Alaska Supreme Court denies Petition for Rehearing

JURISDICTIONAL BASES FOR THIS COURT

1. The Final Order was entered on 3-4-96, the Alaska Supreme Court's Memorandum Opinion and Judgment upholding Judge Savell's 12-13-95 ruling.

2. This case is related to a case under appeal with the Ninth Circuit [F-021]. (Rule 11)

3. The Alaska Supreme Court denied rehearing on 4-7-97.

4. This Court has jurisdiction to review the judgment by the Alaska Supreme Court under USC., 28 Sec. 1254, 1257.

CONSTITUTIONAL PROVS.- STATUTES - REGULATIONS

US Constitution Article 4 Sec. 1, 2

Article 3 Sec. 2 Article 6.

Amdnt. 5, eminent domain.

Amdnt. 7, trial by jury.

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Amdnt. 13, involuntary servitude.

Amdnt 14, due process of law.

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Alaska Constitution Art. 1. Sec. 1.
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49 CFR Sec. 24.101

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STATEMENT OF THE CASE

FACTUAL STATEMENT.

The trial court had found an early taking based on business interference. Because of a third party's involvement, the parties

stipulated to split the condemnation case. The first trial would only deal with the raw land. Decreases attributed to the highway project and business damages were bifurcated to a second trial [A.11, 41, 68]. The first trial was held establishing the impaired value of the raw land [A.68]. On the eve of the second trial commencement, the case was dismissed by a new judge, based on an alleged failure to appeal a borough platting board decision. The Alaska Supreme Court reversed. However, instead of remanding the case back to proceed with the interrupted second trial, the high court, *sua sponte*, took on the roll of the jury and made several factual findings, but without the benefit of knowing the facts [A.12].

The Supreme Court concluded that we must reestablish an inverse taking based on a test provided by the Court. If an early taking were found, our compensation would be limited to interest on the value [A.13]. We would not receive the actual value of the property on the date of taking. The Court simply ignored the bilateral agreement where the parties had stipulated to bifurcate several property rights to a second trial. The net result was that we were not compensated for $350,000.00 worth of fixed improvements that we had installed on the property, nor for the enhanced value attributed to the improvements. Nor did we receive compensation for decreases attributed to the highway project.

I submitted several motions for leave to raise the bifurcated issues [A.41, 68] in what was left of the second trial, but all attempts were denied by the Alaska Supreme Court without explanation [A.48].

The trial court recognized the injustice and invited us to amend our complaint to include the bifurcated issues. This effort was also reversed by the Supreme Court. The trial court eventually found a business interference taking, and we received interest as damages calculated on the value of raw land two years later, when it was severely impaired by the proposed highway project.

After several unsuccessful attempts to litigate the value of the fixed improvements and decreases caused by the highway project in state courts [A.48] I was prepared to initiate federal litigation. I learned through case law that I first had to raise the issues in the state court. Having been denied an opportunity to raise the issues in the sister cases, I initiated a new state case in the Savell Court in order to exhaust State remedies. By now additional post trial issues had emerged, such as the State's failure to build an access road on adjoining property and civil rights violations. These civil rights violations consisted mainly of the State's and its officers' engaging in a fraudulent agreement, stipulating to bifurcate valuable property rights to a second trial [A.41, 68], and breaching that agreement when it was too late to appeal the first trial. This has resulted in our not having been provided due process or just compensation for the State's taking our improvements.

The Savell Court dismissed all issues without even permitting discovery. It held that all taking issues were *res judicata* even though my claim involved bifurcated issues and post trial issues. The court

apparently viewed our several denied attempts to raise the issues in the sister case as our having had a fair opportunity to fully litigate the issues on their merits, even though there had never been a hearing on the issues. The court based its ruling on the erroneous assumption that the State's appraiser had appraised the property as "fully subdivided" in the sister case [A.11], he did not [A.45, 66]. The court dismissed our civil rights claims based on time bar and immunity, even though there had been continuous litigation on other legal theories, and *equitable estoppel* should therefore have applied. Further, our claim also exposed fraud which also should have tolled time. Most importantly, we did not know if we had been damaged until all appeals in the sister cases were decided. Regarding immunity, this Court has ruled that a state officer is not immune from violating civil rights under the color of state law. It is therefore a fact that federal law was not properly applied by the state courts [A.49-57].

This case also addresses abuse and violation of due process and just compensation. This case is to determine whether being denied leave to litigate issues in a sister case erroneously, without a hearing on the merits, trigger's *res judicata* in an independent action based on federal law. Further, this case is about whether *res judicata* can apply to bifurcated and post trial issues.

The Alaska Supreme Court has stated that the value was established by the jury in the first trial and therefore it is inappropriate

to reopen the issue of just compensation, and the issues are now *res judicata*. This position ignores the fact that the parties stipulated to litigate these property rights issues in a second trial [A.41]. It also ignores the fact that several issues are post trial issues.

The Supreme Court has also stated that we lost the right to future litigation because we did not appeal the first trial. Appealing the first trial should not be relevant to our post trial issues. This holding also ignores the bifurcation agreement [A.41]. We did not disagree with the jury from the first trial, that the property was impaired, and there was therefore no apparent reason to appeal. A second trial on the bifurcated issues was guaranteed by our agreement, court order, and by the Constitution.

RAISING THE FEDERAL QUESTIONS IN THE STATE COURTS, THE METHOD OF RAISING THEM, AND HOW THEY WERE PASSED ON BY THE COURTS

Besides raising the federal issues on several occasions in the sister cases and in several motions in this case, (1) we raised the federal issues in our 4-10-95 Complaint, (2) we raised the issues in our 12-26-65 Motion to Reconsider Dismissal, (3) we raised the issues in our 1-25-96 Points on Appeal.

The Savell Court dismissed all issues based on *res judicata*, immunity, or time bar.

The federal issues were raised in several motions to the Alaska Supreme Court during the case 2287 appeal. Our motions were all

denied without the Court's providing a reason. (1) The federal issues were raised in our 8-5-96 Brief of Appellant [case 4FA-95-870]. The federal issues were raised in our 3-21-97 Motion to Reconsider and for Rehearing. The motion was denied without the Court's providing a reason.

The Alaska Supreme Court has simply ignored the bifurcation agreement. It has held that just compensation was determined by the jury in the first trial, and because we did not appeal that verdict, we cannot receive compensation for the improvements, even though the issues were bifurcated from that trial.

ARGUMENT

Reasons for granting a Writ of Certiorari.

1. A state court of last resort has decided on an important federal question in a way that conflicts with the decision with another state court of last resort or of a United States court of appeals.

2. A state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this court.

This case involves a state's, and its officers', blatantly violating federal civil rights by singling out our family to pay a disproportionate share of a public project, by fraudulently stipulating to bifurcate federal property rights to a second trial, benefiting from part performance, and

then breaching our bilateral contract when it was too late too appeal the first case and then denying our access to the courts on the bifurcated, and post trial issues because we did not appeal the first trial. The fact that this land scam was perpetrated by a government makes it worse, not better.

QUESTION 1. Whether futile attempts to raise issues in a sister case trigger *res judicata* in an independent action, when the issues had been formally preserved for future litigation and our claims involved post trial, bifurcated issues and fraud (and where the judge acted under conflict of interest).

The Due Process Clause guarantee "to all individuals [of] a meaningful opportunity to be heard. 401 US 379 ***Logan v. Zimmerman Brush Co*** 455 US 422 (1982), ***JB v. Washington County*** 905 F Supp 907 (D.Utah 1995), ***Sheerbonnet, Ltd. v. American Express Bank LTD*** 905 F Supp 127 (S.D.N.Y. 1995).

The Savell Court should not have denied discoveries. It should not have dismissed issues that the parties had stipulated to bifurcate to a second trial or post trial issues. Being denied an opportunity to raise the issues in a sister case does not make those issues *res judicata* in a new independent action nor does it satisfy the federal mandate of due process. *Res judicata* was never intended to permit a court to dismiss an independent action against fraudulent entry into a contract to bifurcate property rights to a future trial, followed by breach of that contract when it was too late to appeal the first trial. Nor is *res judicata* relevant to

the State's taking an access road on adjoining property several years later. Further, our civil rights claims should not have been dismissed on time bar and immunity. The federal issues had been formally preserved during previous litigation, without objection from the State [A.77]. There had been continuous litigation attempting to find relief through pursuit of other legal concepts and the damage, if any, had not yet been established. Dismissing on this ground was abuse of due process.

Judge Savell's dismissal was not based on established law. It is clear that Judge Savell had a conflict of interest, having represented my former partner on real estate matters at the time of our dissolving our partnership and Judge Savell's being a likely witness (my former partner now passed away). Further, Judge Savell dismissed the case shortly before he sought the governor's endorsement for appointment to the Alaska Supreme Court. Furthermore, the wife of the state officer charged in our complaint, is a colleague of Judge Savell (Judge Savell denied all discovery).

QUESTION 2. Whether a state supreme court, *sua sponte*, taking on the role of the fact-finder violates federal due process.

The Alaska Supreme Court's taking on the role of fact finder prevented our having an opportunity to explain evidence and develop a full factual record. The limited format of an appeal does not provide that process. We have the right to have a jury decide whether property rights were taken absent just compensation, or alternatively, whether the

State and its officers violated our civil rights. Whether there were business damages or decreases caused by the highway project are jury issues and not factual issues to be decided by the Alaska Supreme Court on appeal from summary judgment.

QUESTION 3. Whether a state's providing due process and just compensation and adhering to state and federal condemnation law is discretionary.

The Alaska Supreme Court appears to have made a game of how far they can abuse our civil rights. The Alaska Supreme Court has departed from all fundamental law. It has made such unorthodox rulings as denying the highest and best use, not appraising the property impaired, compensation for fixed improvements. The Court denied litigating bifurcated issues. The Court even denied my motion to adhere to statutory law. The Supreme Court reversed the lower court's finding of an inverse taking, it reversed the lower court's invitation to amend our complaint and to proceed on an alternate legal doctrine. It denied us litigation fees when we prevailed on appeal. It fined us $2,500.00 for attempting to reopen the first trial after it denied us the right to litigate the bifurcated issues in the second trial. It only permitted 75% litigation fees when we prevailed in what was left of the second trial, even though Rule 72 provides for 100%. It did not permit us to establish the value on the date of taking, and based the value on a single tract of unimproved land, two years later, impaired from the highway project and with inferior zoning, when it in fact took 4 fully improved city lots.

It permitted the State to default on the Bifurcation Agreement that was reduced to a court order. It denied our amending our Points on Appeal.

> The hearing required by the due process clause of the Fourteenth Amendment must be meaningful and appropriate. . . . It is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision . . . does not meet this standard. ***Bell v. Burson*** 402 US 535 (1971). The constitutional requirement (of a hearing before deprivation of a property right) does not depend upon any narrow balancing process. ***Roberts v. New York*** 295 US 264 (1934), ***Board of Regents v. Roth*** 408 US 564 (1972).

The Fourteenth Amendment provisions are clear federal mandates not subject to sovereign immunity. Otherwise, the Fourteenth Amendment would have no meaning.

The Alaska Supreme Court's denying an opportunity to litigate the issue of compensation for the $350,000 worth of fixed improvements and the enhanced value attributed to those improvements, as well as from the property's having been subdivided city lots, is unprecedented and contrary to the law and to every other state or circuit court's ruling. Moreover, it is contrary to the rulings of this Court. Further, the State's failure to build the frontage road to which it committed in the taking documents, leaving some lots landlocked after the taking, was an additional compensable taking of property rights. ***State v. Glen*** 602, P2d 253 (Or. 1979), ***State v. Lewis*** 785 P2d 24 (AK 1990), ***Grant v. State of Alaska*** 560 P2d 36(AK 1977).

The Fifth Amendment provides for due process and just compensation. The standards set by this Court have been ignored by the Alaska Supreme Court. Taking property rights absent a hearing on the issues and not paying for fixed improvements does not reach that standard. The State can adopt its own Constitution and statutes, but they may not fall below the federal standards. ***First Lutheran Church v. Los Angeles County*** 482 US 304 (1987), ***United States v. Virginia E.&P. Co.*** 365 US 624 (1961), ***Kirby Forest Industries, Inc. v. United States*** 467 US 1 (1984), ***United States v Twin City Power Co.*** 350 US 222 (1955), ***Parratt v. Taylor*** 451 US 524 (1981), ***Ruckelshous v. Monsanto Co.*** 467 US 986 (1984).

The Seventh Amendment provides for a jury's deciding factual issues. The Alaska Supreme Court did not have the right to deny a jury trial on all factual issues. ***Burlington Northern v Nebraska Public Power Dist.*** 931 F Supp 1470 (D.Neb. 1996), ***United States v Gaudin*** 132 L Ed 2d 444 (1995). For opposing view, ***Wilson v. Jones*** 902 F Supp 673 (E.D.Va 1995).

The Eighth Amendment provides for no excessive fines or cruel and unusual punishment. Taking vested property rights absent just compensation, destroying our business, singling out our family to pay a disproportionate share ($2 million) of a public project, and taking our property for less than our cost -- less than we owed the bank, making us subject to a judicial foreclosure, even though the relevant

issues had been preserved in a Bifurcation Order for litigation in a future trial, is an excessive fine and cruel and unusual punishment. (no rulings on the issue)

The Thirteenth Amendment provides for no involuntary servitude. We have never intentionally waived our rights to just compensation. Being singled out to pay a disproportionate share of a public project violates this Amendment. (no rulings on the issue)

The Fourteenth Amendment provides for due process of law when taking private property and for equal protection of the laws. The Alaska Supreme Court's taking on the role of fact finder, absent a hearing, violated this Amendment. Singling out our family to pay more than our fair share of the highway project violates this Amendment. ***Parratt v. Taylor*** 451 US 524 (1981), ***Logan v. Zimmerman Brush Co*** 455 US 422 (1982), ***Bell v. Burson*** 402 US 535 (1971), ***Roberts v. New York*** 295 US 264 (1934), ***Board of Regents v. Roth*** 408 US 564 (1972).

The Alaska Supreme Court must adhere to state <u>and federal laws</u>. In our case <u>all</u> condemnation laws were ignored:

1. <u>*The highest and best use*</u>. The Alaska Supreme Court's denial of compensation based on the highest and best use for which the property was suitable on the date of taking, contradicts the law of the land. Judge Blair and Judge Steinkruger both found the highest and best use to be as subdivided lots [48, 115(5)]. Yet, we were only compensated

for a single tract of unimproved raw land [p.99, 230]. ***Carl R. Lange v. State of Washington*** 547 P2d 282 (Wash. 1976).

2. *Fair market value on date of taking.* The Alaska Supreme Court's denial of compensation for the fair market value on the date the property was actually taken, before it became impaired by the pendency of the highway project, violates AS 34.60.120(3) and 49 CFR Sec. 24.103(b). It ignores those issues' having been preserved for future litigation in a partially implemented Bifurcation Agreement. This is contrary to the law of the land. ***First Lutheran Church v. Los Angeles County*** 482 US 304 (1987), ***United States v. Twin City Power Co.*** 350 US 222 (1955).

> Just compensation, as required by the Fifth Amendment, means the value of what is taken at the very time it is taken and to the person from whom taken. ***Kirby Forest Industries, Inc. v. United States,*** 467 US 1 (1984).

3. *AS 34.60.120 (3) [p.217] or 49 CFR Sec. 24.103 (b)[p.220]*

Accordingly, the impact of that event upon the likelihood of actual exercise of the easement cannot be considered. As one writer has pointed out, "[i]t would be manifestly unjust to permit a public authority to depreciate property values by a threat ... [of the construction of a government project] and then to take advantage of this depression in the price which it must pay for the property" when eventually condemned. ***United States v Virginia E. & P. Co.*** 365 US 624 (1961).

The framers intended for decreases to be excluded, not disregarded as held by the Alaska Supreme Court.

5. *Damages* The Alaska Supreme Court erred in denying compensation for damages to our business that was located on the premises and to our investment backed housing project. The addition of the word "damaged" to our Constitution [p.212] made compensation for damages a federal vested property right. Nor should our business or our investment backed project have been taken absent just compensation. The stipulated agreement estops the State from now opposing damages and decreases. ***F.Giannini v. First National Bank of De Plains*** 483 NE 2d 924 (Ill. App. 1985).

> Pretrial stipulation has the effect of amending the complaint. ***Lake Havasu Com. Hosp v. Ariz Title Ins*** 687 P2d 371 (Ariz App 1984).
>
> Stipulation does not evaporate with new counsel. Stipulation will stand; when one reaped the benefits one cannot deny stipulation. ***Marden v. Intern. Ass'n of Machinist ETC.*** 576 F2d 576 (1978).
>
> [O]ral contract with respect to interest in land may become enforceable, in spite of statute of frauds, where there has been part performance. ***Pedring v. Chun*** 906 F.Supp. 1377 (D.Hawaii 1995).
>
> The "just compensation" provision in the Fifth Amendment is designed to bar government from forcing some people alone to bear a public burden which, in all fairness and justice, should be borne by the public as a whole. ***First Lutheran Church v. Los Angeles County*** 482 US 304 (1987).

QUESTION 4. **Whether a federal civil right claim can be dismissed on time bar and immunity, before**

the damage is known, when there has been ongoing litigation and fraud is an issue.

Permitting the State's entering into a Bifurcation Agreement to remove vested property rights from the first trial for future litigation and then to breach this bilateral contract after partial implementation is contrary to the law of the land. So is the State's and its officers' habitually misrepresenting to the courts what property rights were taken, enforcing an illegal department policy to take property for as little as possible, regardless of applicable laws. ***Ketron v. Chattanooga - Hamilton County Hosp.*** 919 F Supp 280 (E.D.Tenn. 1996), ***Hafer v. Melo*** 502 US 21 (1991), ***Stevens v. McHan*** 3 F3d 1204 (8th Cir. 1993), ***Valdez v City of New London*** 903 F Supp 286 (D.Conn. 1995), ***Pruneyard Shopping Center v. Robins*** 447 US 74 (1980), ***Roberts v. City of Forest Acres*** 902 F Supp 662 (D.S.C. 1995), ***Sanfilippo v. County of Santa Cruz*** 415 F.Supp 1340 (N.D.Cal. 1976).

> . . . whether breach affects interest sufficiently grave to trigger due process scrutiny; court must look to effect of breach on claimant and determine whether effect is so dramatic and rights implicated so fundamental that Constitution provides remedy. ***Irwin v. City of New York*** 902 F Supp 442 (S.D.N.Y. 1995).
>
> Taking -- Result. It does not matter how it was done, technical label, it is the result that matters. ***Hughes v. Washington*** 389 US 290, 298 (1967)
> Insofar as 42 USCS Sec. 1983 affords a civil remedy for deprivations of federally protected rights by persons acting under color of state law without any express requirement of a particular state of mind, the initial inquiry in any Sec. 1983 action must focus on whether

> two essential elements to a Sec. 1983 action are present, that is, whether the conduct complained of was committed by a person acting under color of state law, and whether this conduct deprived the person of rights, privileges, or immunities secured by the Constitution or laws of the United States. ***Parratt v. Taylor*** 451 US 524 (1981).

Equitable Estopple tolled time. There is no immunity from violating constitutional rights under the color of state law. We should at the very least have been accorded a hearing on whether these constitutional violations existed. These are fundamental federal rights that must be enforced.

While there is no set formula for determining when justice and fairness require that economic injuries caused by a public action must be deemed a compensable taking, and the inquiry into whether a taking has occurred is essentially an ad hoc, factual inquiry; several factors should be taken into account when determining whether a governmental action has gone beyond regulation and effects a taking, among which are the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations. ***Ruckelshaus v. Monsanto Co.*** 467 US 986 (1984), ***Howard v. Grinage*** 82 F3d 1343 (6th Cir. 1996), ***State v. Waggoner*** 319 S.W.2d 930 (Mis. 1959), ***City of Los Angeles v. Decker*** 558 P2d 545 (Cal. 1977).

QUESTION 5. The Bifurcation Agreement.

The State and its officers should not have engaged in this fraudulent agreement in order to avoid paying for the improvements we had done to the area. This was a bilatteral contract where the state had benefited from partial performance by keeping valuable property rights out of the first trial. We have a vested federal right in this agreement. It is such basic law that I will not add case law citations.

QUESTION 6. Paying a disproportionate burden.

Singling out our family to subsidize this highway project with our working capital and savings by paying less than our cost for the property and less than what we owed to the bank, making our family subject to a judicial foreclosure, making us substantially poorer, violated the Alaska Constitution that provides for damage compensation. A Constitutional violation is self-executing. [W]here a plaintiff's claim had been dismissed for failure to comply with a trial court's order -- the Court read the "property" component of the Fifth Amendment's Due Process Clause to impose "constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." ***Parratt v. Taylor*** 451 US 524 (1981), ***Carter v. Carter Coal Co.*** 298 US 342 (1935), ***First Ev. Chur. Glendale v. LA*** 482 US 304

(1987), ***Defeo v. Sill*** 810 F Supp 648 (ED. PA. 1993), ***Irwin v. City of New York*** 922 F Supp 442 (S.D.N.Y. 1955).

CONCLUSION

The main question is whether the state can ignore all laws in order to get a bargain on land.

DATED this 5th day of May, 1997 at Fairbanks, Alaska.

By: _____

Lars W. Ehrlander, *pro se*